# Balbir Singh a/l Chanan Singh v Thirunaugarasu a/l Muthusamy & Anor

HIGH COURT (IPOH) — CIVIL APPEAL NO 12–50 OF 2008
CHOONG SIEW KHIM JC
3 MAY 2010

*Damages (Personal Injury or Death) — Quantum — Special and general damages — Appeal against quantum — Whether amount awarded by trial judge reasonable and fair — Whether there was sufficient ground to interfere with award for general damages — Whether appeal ought to be allowed*

The appellant commenced a civil suit against the respondents for general and special damages suffered by him as a result of an accident between a motorcycle, in which he was the pillion rider, and the car driven by the second respondent. The respondents brought in the motorcyclist as a third party. The sessions court judge found the respondents 25% liable and the third party 75% liable for causing the accident. In relation to the general damages, the appellant submitted that there was a 1cm shortening arising from the closed fracture of the right femoral condyle, whereas the respondents claimed that there was no shortening of the right lower limb. After due consideration of the two specialist medical reports tendered by the appellant and the specialist medical report by the respondents the trial judge found the medical report tendered by the respondents' specialist to be more current and accurate. She hence found that the closed fracture of the right femoral condyle did not contribute to or cause any shortening and decided that the sum of RM15,000 was appropriate and reasonable in the circumstances. The trial judge further awarded the appellant RM20,000 for a compound grade 2 comminuted fracture of the left tibia/fibula, RM8,000 for the avulsion fracture of the left posterior cruciate ligament and RM10,000 for the scars, after considering the authorities relied on by the appellant with regard to those injuries. With regard to special damages the trial judge allowed a claim of RM3,000 in respect of future surgery for the removal of implants, the medical bill from a private hospital of RM1,218, being one-third of the total sum claimed by the appellant, and loss of earnings for three months at RM1,500 per month. At the trial, the appellant testified that his monthly earnings as a transporter amounted to RM6,000 to RM7,000 and that following the accident he did not work for three years as he was not able to drive a lorry. He also alleged that during those three years he had worked as a security guard for a salary of RM600 a month. However, evidence was adduced that various traffic summonses had been issued against the appellant four months after the accident. The appellant explained that this was because his brother had used his driving licence and permit to drive the lorry

thus implying that his brother was the one who drove the lorry during the period in question. Dissatisfied with the amounts allowed by the trial judge the appellant appealed against the quantum only.

**Held**, allowing the appeal in part with costs:

(1) A closer perusal of the specialist medical report of the respondents' specialist revealed that there was a valgus deformity of the right knee and the range of movement in the right knee was 25 degrees less than the left because of this head of injury. As the sessions court judge had clearly overlooked this finding the award of RM15,000 was increased to and substituted with the sum of RM20,000 in the circumstances (see para 8).

(2) There was no convincing reason and basis to disturb the amounts allowed for the other injuries as claimed under the head of general damages, as the amounts awarded by the trial judge in respect of those were fair and reasonable (see paras 9 & 11).

(3) The appellant chose to be admitted to a private hospital where he was merely put on physiotherapy exercises to increase the range of movements in his knee joints. As there was no evidence that such treatment was not available or adequate at the government hospital, the trial judge had not erred in awarding one-third of the whole for medical charges (see para 12).

(4) The sessions court was correct in awarding the lower of the two costs of future surgery as being the more reasonable charge (see para 14).

(5) The appellant did not call his brother to corroborate his testimony and contention that the summonses were issued when his brother and not he had driven the lorry. He had thus failed to prove that he was unable and did not drive any lorry four months after the accident. As such the sessions court could not award any loss of earnings for three years after the accident and continuous partial loss of earnings thereafter. The trial judge had considered the relevant evidence in deciding that the multiplicand ought to be RM1,500. However, the multiplier ought to be four months instead of three months. Hence loss of earnings for three months is substituted with loss of earnings for four months amounting to RM6,000 (see paras 22 & 24).

**[Bahasa Malaysia summary**

Perayu telah memulakan guaman sivil terhadap responden-responden untuk ganti rugi am dan khas yang dialaminya akibat daripada kemalangan antara motosikal, yang mana dia pemboncengnya, dan kereta yang dipandu oleh responden kedua. Responden-responden telah memasukkan penunggang motosikal itu sebagai pihak ketiga. Hakim mahkamah sesyen mendapati responden-responden bertanggungjawab sebanyak 25% dan pihak ketiga

bertanggungjawab sebanyak 75% kerana menyebabkan kemalangan itu. Berkaitan ganti rugi, perayu berhujah bahawa terdapat pemendekan 1sm akibat keretakan femur kondil kanan, manakala responden-responden mendakwa bahawa tiada pemendekan anggota bawah sebelah kanan. Setelah dipertimbangkan sewajarnya dua laporan perubatan pakar yang dikemukakan oleh perayu dan laporan perubatan pakar oleh responden-responden hakim perbicaraan mendapati laporan perubatan yang dikemukakan oleh pakar responden-responden lebih terkini dan tepat. Beliau justeru itu mendapati bahawa keretakan femur kondil kanan tidak menyumbang kepada atau menyebabkan apa-apa pemendekan dan memutuskan bahawa jumlah RM15,000 adalah sesuai dan munasabah dalam keadaan tersebut. Hakim perbicaraan selanjutnya telah mengawardkan perayu RM20,000 untuk tulang patah tibia/fibula kiri kompaun gred 2, RM8,000 untuk keretakan avulsi ligamen krusiat posterior kiri dan RM10,000 untuk kesan luka, setelah menimbangkan autoriti-autoriti yang digunakan oleh perayu berkaitan dengan kecederaan-kecederaan tersebut. Berhubung ganti rugi khas hakim perbicaraan membenarkan tuntutan RM3,000 berkaitan pembedahan masa hadapan untuk pemindahan bahan implan, bil perubatan dari hospital swasta sebanyak RM1,218, iaitu satu pertiga daripada jumlah keseluruhan yang dituntut oleh perayu, dan kehilangan pendapatan selama tiga bulan iaitu RM1,500 sebulan. Semasa perbicaraan, perayu telah memberi keterangan bahawa pendapatan bulanannya sebagai pengangkut berjumlah RM6,000 hingga RM7,000 dan bahawa berikutan kemalangan itu dia tidak bekerja selama tiga tahun kerana tidak dapat memandu lori. Dia juga mengatakan bahawa sepanjang tiga tahun itu dia bekerja sebagai pengawal keselamatan dengan gaji RM600 sebulan. Walau bagaimanapun, keterangan mengemukakan pelbagai saman trafik yang didapati telah dikeluarkan terhadap perayu selepas empat bulan kemalangan itu. Perayu menjelaskan bahawa ini adalah kerana abangnya telah menggunakan lesen memandunya dan permit untuk memandu lori tersebut dengan itu membayangkan bahawa abangnya yang memandu lori tersebut sepanjang tempoh yang dipersoalkan. Berasa tidak puas hati dengan jumlah yang dibenarkan oleh hakim perbicaraan perayu telah merayu terhadap kuantum sahaja.

**Diputuskan**, membenarkan sebahagian rayuan dengan kos:

(1) Penelitian rapi laporan perubatan pakar oleh pakar responden-responden menunjukkan bahawa terdapat kecacatan Valgus di lutut kanan dan kadar pergerakan di lutut kanan kurang 25 darjah daripada bahagian kiri kerana kepala kecederaan ini. Oleh kerana hakim mahkamah sesyen telah jelas terlepas perhatian membuat penemuan ini dalam keadaan berikut award RM15,000 telah ditambah dan digantikan dengan jumlah RM20,000 (lihat perenggan 8).

(2) Tiada sebab dan asas yang meyakinkan untuk mengganggu jumlah-jumlah yang dibenarkan untuk kecederaan-kecederaan lain

sepertimana dituntut di bawah kepala ganti rugi am, memandangkan jumlah-jumlah yang diawardkan oleh hakim perbicaraan berkaitan yang berikut adalah adil dan munasabah (lihat perenggan 9 & 11).

(3) Perayu telah memilih untuk dimasukkan ke hospital swasta di mana dia hanya menjalani senaman fisioterapi bagi meningkatkan kadar pergerakan pada sendi lututnya. Oleh sebab tiada keterangan bahawa rawatan sebegini tidak sedia ada atau mencukupi di hospital kerajaan, hakim perbicaraan tidak terkhilaf dalam mengawardkan satu pertiga daripada keseluruhan caj perubatan (lihat perenggan 12).

(4) Mahkamah sesyen adalah betul dalam mengawardkan yang terendah daripada dua kos pembedahan masa hadapan sebagai caj yang lebih munasabah (lihat perenggan 14).

(5) Perayu tidak memanggil abangnya untuk menyokong testimoni dan pendapatnya bahawa saman-saman tersebut telah dikeluarkan semasa abangnya dan bukannya dia yang memandu lori tersebut. Oleh demikian dia telah gagal membuktikan bahawa dia tidak berupaya dan tidak memandu apa-apa lori empat bulan selepas kemalangan itu. Dengan itu mahkamah sesyen tidak boleh mengawardkan apa-apa kehilangan pendapatan untuk tiga tahun selepas kemalangan itu dan sebahagian daripada kehilangan pendapatan yang berterusan selepas daripada itu. Hakim mahkamah telah menimbangkan keterangan yang relevan dalam membuat keputusan bahawa pendarab sepatutnya adalah RM1,500. Namun begitu, pengganda sepatutnya untuk empat bulan dan bukan tiga bulan. Justeru itu kehilangan pendapatan selama tiga bulan telah digantikan dengan kehilangan pendapatan selama empat bulan berjumlah RM6,000 (lihat perenggan 22 & 24).]

**Notes**

For cases on quantum of damages in general, see 6 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 951–1983.

**Cases referred to**

*Engketeramana a/l Ramasamy v Zulkifly bin Johari & Anor* 6 Mallal's Digest (4th Ed, 2010 Reissue) para 1937, SC (refd)

*Hee Beng Sim v Lim Seng Khuan* 6 Mallal's Digest para 1320 (refd)

*Letchumiah Aplasamy v Mara Express Bhd & Anor* 1994 MLJU 350; 6 Mallal's Digest (4th Ed, 2010 Reissue) para 1519, HC (refd)

*Saranjit Singh (Saranjit) for the appellant.*
*YK Cheong (Loh & Associates) for the respondents.*

**Choong Siew Khim JC:**

**[1]** The appellant (Balbir Singh a/l Chanan Singh) was the plaintiff in civil suit No 53–276 of 2002 arising from an accident between motorcycle ADS 8130 (of which he was the pillion-rider) and motorcar ADR 73 driven by the second defendant. The motorcyclist was brought in as the third party by the two defendants (respondents in this appeal). The learned sessions court judge found the respondents 25% and the third party 75% liable for causing the accident.

**[2]** On the basis of 100% liability, the respondents were ordered to pay the appellant general and special damages as follows (ie items relevant to the appeal):

| | | |
|---|---|---|
| (A) General Damages | | |
| (i) | Closed fracture of right femoral condyle | RM15,000 |
| (ii) | Compound grade II (2) comminuted fracture of left tibia/fibula | RM20,000 |
| (iii) | Avulsion fracture of left posterior cruciate ligament | RM8,000 |
| (iv) | Scars | RM10,000 |

| | | |
|---|---|---|
| (B) Special Damges | | |
| (i) | Future surgery for removal of implants | RM3,000 |
| (ii) | Medical bill from private hospital (Hospital Fatimah) | RM1,218 |
| (iii) | Loss of earnings at RM1,500 for 3 months | RM4,500 |

**[3]** For item B(ii), the appellant claimed a total of RM3,655 for medical charges by Hospital Fatimah. The sessions court judge however allowed a sum of RM1,218 which was 1/3 of the amount claimed.

**[4]** The appellant, being dissatisfied with the amounts given for the above items of general and special damages, appealed against quantum only.

CLOSED FRACTURE RIGHT FEMORAL CONDYLE

**[5]** The bone of contention was whether there was 1cm shortening arising from this fracture which affected the amount allowable as a result of this

A residual disability. The appellant contended there was 1cm shortening to his right limb whereas the respondents claimed there was none. The appellant relied on two specialist reports by Dato' Dr KS Sivananthan of Hospital Fatimah. These two reports by the same specialist were contradictory, one dated 29 May 2001 (P10) stating that both lower limbs were of equal length B (see p 103 of the appeal record) whilst the other dated 5 June 2003 (P11) specifically referred to an impairment of 1cm shortening in the right lower limb (see p 114 of the appeal record). The accident occurred on 11 September 1999.

C **[6]** Dr N Prasad who examined and reassessed the appellant at the behest of the respondents on 4 August 2005 found that there was no real shortening of his right or left lower limb apart from his finding that the appellant was still unable to squat and tended to limp when walking (see p 364 of the appeal record). All the fractures have also united in good position and this was in consonance with Dato' Dr KS Sivananthan's finding that the fractures have D united (p 114 of the appeal record).

**[7]** At this appeal, the appellant submitted that he was entitled to at least RM30,000 for this head of injury. He relied on cases referred to at the sessions court. E

**[8]** The sessions court judge had considered the three specialist reports but went on to accept that D25 (Dr N Prasad's report) was more accurate and current due to the inconsistent and conflicting findings of the appellant's own F specialist with regard to the issue of shortening. In other words, she found it safe to rely on D25 than on P10 or P11. She hence found that the fracture of the right femoral condyle did not contribute to or cause any shortening. In my opinion, she did not err in any way by consequently deciding that the appellant did not suffer from 1cm shortening as a result of the fracture but was the sum G of RM15,000 appropriately and reasonably awarded when a closer perusal of D25 revealed that there was a valgus deformity of the right knee and range of movement in the right knee was 25° less than the left in flexion apparently arising from this head of injury. It is my view that the sessions court judge had clearly overlooked this and I am hence inclined to find that a higher award is H fair and more consistent with these residual disabilities suffered by the appellant. The award of RM15,000 is increased to and substituted with the sum of RM20,000 in the circumstances.

COMPOUND GRADE 2 COMMINUTED FRACTURE OF LEFT I TIBIA/FIBULA

**[9]** For this injury, I find that the sessions court judge had considered the cases relied on by the appellant (*Letchumiah Aplasamy v Mara Express Bhd & Anor* 1994 MLJU 350; 6 Mallal's Digest (4th Ed, 2010 Reissue) para 1519 and

*Engketeramana a/l Ramasamy v Zulkifly bin Johari & Anor* 6 Mallal's Digest (4th Ed, 2010 Reissue) para 1937) and viewed the higher amounts awarded due to more serious residual disabilities suffered by the plaintiffs in those cases. D25 did not reveal similar disabilities or any obvious disability arising from this fracture. There is therefore no convincing reason and basis for me to disturb the amount of RM20,000 allowed by her under this item.

AVULSION FRACTURE OF LEFT POSTERIOR CRUCIATE LIGAMENT

**[10]** The trial judge was guided by and had considered the authority cited by learned counsel for the appellant (*Hee Beng Sim v Lim Seng Khuan* 6 Mallal's Digest para 1320) before awarding RM8,000 for this injury. At this appeal, the same counsel failed to submit on what basis this award was manifestly low to allow this court to disturb it.

SCARS

**[11]** I am inclined to agree with the respondents that the award of RM10,000 is a fair and reasonable sum for the nine scars suffered by the appellant on his two limbs.

PRIVATE HOSPITAL MEDICAL CHARGES

**[12]** It is beyond comprehension that the appellant could expect to be awarded fully the total amount incurred for his treatment at Hospital Fatimah when his initial admission and subsequent treatment at Hospital Ipoh had involved the internal fixation of his fractures. On 20 September 1999 he discharged himself at his own risk (see p 91 of the appeal record) after which he chose to be admitted to Hospital Fatimah where he was merely put on physiotherapy exercises to increase the range of movements in his knee joints (see p 111 of the appeal record). There was no record of any other medical treatment given to him at Hospital Fatimah. There was no evidence that the physiotherapy treatment at Hospital Fatimah was not available or adequate at Hospital Ipoh. The sessions court judge had not erred in awarding 1/3 of the whole.

COST OF FUTURE SURGERY

**[13]** Contrary to Dato' Dr KS Sivananthan's estimate of RM4,500 as costs for the removal of the metal implants in the right femoral condyle and left tibia/fibula (see p 105 of the appeal record), such removal surgery according to Dr N Prasad will cost RM3,000 with two days' hospitalisation as both surgeries can be done at the same time (see p 364 of the appeal record).

**[14]** The sessions court was correct in awarding the lower of the two being the more reasonable charge.

LOSS OF EARNINGS

**[15]** There was no dispute that prior to the accident the appellant was a transporter who owned lorry ACW 1660. The appellant claimed his net earnings per month then was RM6,000–RM7,000 after deducting petrol and maintenance costs.

**[16]** He testified in chief that following the accident, he did not work for three years as he was not able to drive a lorry. After those three years, he worked as a security guard with his father on a much reduced salary of RM600 a month.

**[17]** In cross-examination he said he still owned the lorry and he did not employ anyone to run his transport business. He however later revealed that he had given the lorry to his brother to continue with the business but he did not pay wages to his brother.

**[18]** In re-examination, he again somewhat changed his testimony by stating that the profits were taken by his brother as the lorry was sold to him. Over and above his less than credible evidence on this matter, the appellant when asked in cross-examination about summonses issued against him after the accident explained that this was because his brother had used his driving licence and permit to drive the lorry thus implying that his brother was the one who drove the lorry when the summonses were issued.

**[19]** In re-examination, he clarified that the summonses were issued in his name as the permit was in his name.

**[20]** Rebuttal evidence was adduced by the defendants through SD1 that summonses (D27A - J) were issued to the appellant for various traffic offences, the earliest dated 27 January 2000 (D27A) which was just over four months after the accident on 11 September 1999. SD1 confirmed that these summonses were issued in the name of the appellant who was stopped by the police and required by the police to show his identity card before the issuance of the summonses. SD1 disagreed that someone else had used the identity card and licence of the appellant during the commission of those traffic offences.

**[21]** SD2 testified that the appellant's GDL (licence for transporting goods) expired on 16 June 1999 and was not renewed as of 11 September 1999 on the day of accident. It was only renewed on 19 January 2000 and valid for one year.

Every renewal required medical examination of the GDL holder to ascertain his health condition before renewal was approved.

**[22]** It is pertinent to note that the appellant did not call his brother to corroborate his testimony and contention that the summonses were issued when it was his brother and not him who drove his lorry. He had failed in this way to prove that he was unable to and did not drive any lorry four months after the accident. The appellant's brother would be the only and best person to refute the defendants' stand that the summonses were issued to the appellant when he was the driver. I noted that the appellant merely opted not to call his brother for reasons only best known to himself when in fact it was imperative that he be called. Whether he was available or not was another issue. The appellant also did not call his father to establish his claim that he worked as a security guard three years after the accident that earned him a salary of RM600 per month. He obviously failed to discharge the onus that was upon him to prove, on a balance of probabilities, that he was not able to and did not drive any lorry since the accident thus depriving him of the usual income that he earned prior to the accident. His assertion of loss of earnings being unsubstantiated remained a mere allegation that did not allow the sessions court to award loss of earnings for three years after the accident and continuous partial loss of earnings thereafter.

**[23]** As such, I find from her grounds of judgment that the sessions court judge had properly evaluated the evidence adduced by both parties when she concluded and found that the appellant had resumed work three to four months after the accident. The summons D27A was obviously issued just over four months subsequent to the accident and based on this, the sessions court judge in my opinion ought to have allowed loss of earnings for four months instead of three months being the multiplier.

**[24]** Be that as it may, the trial judge assessed the multiplicand at RM1,500 despite the appellant's testimony at p 39 of the appeal record that his income was RM10,000–RM12,000 a month that he earned by transporting goods for two companies Lean Loong Enterprise and Yong Fu Xing Sdn Bhd. The appellant called two witnesses to prove his earnings. SP4 from Yong Fu Xing Sdn Bhd testified that the appellant's average monthly income as his company's transporter was in the region of RM2,000 with reference to vouchers P22 (1–94) and letter of confirmation P17. SP5 from Lean Loong Enterprise signed P16 that showed freight charges paid to the appellant by his company in 1999. Notwithstanding this, he said that vouchers, P24 (A–Q), were issued for 1996 and 1997. There were no vouchers for the year 1999 and according to him, that meant that the appellant did not provide services to his company in that year. SP5 went on to agree in cross-examination that the appellant transported goods for his company in 1996 and 1997 only and none for the following year

until 1999. SP5's equivocal evidence was not convincing and credible and on this basis the sessions court judge was therefore correct in accepting SP4's evidence when finding that the appellant only transported goods for Yong Fu Xing Sdn Bhd before the accident. She had considered the relevant evidence before deciding on the multiplicand. However based on what was stated earlier, the multiplier ought to be four months. Hence loss of earnings for three months is substituted with loss of earnings for four months amounting to RM6,000.

**[25]** The appeal is allowed with costs only to the extent as stated above.

*Appeal allowed in part with costs.*

Reported by Kohila Nesan